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BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

REPLY OF CSX CORPORATION AND CSX TRANSPORTATION, INC. TO PETITION FOR STAY BY BURLINGTON NORTHERN SANTA FE CORPORATION AND THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

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CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") submit this reply to the petitions for a stay of the Board's Decision, served March 17, 2000 (the "Decision"), filed by Burlington Northern Santa Fe Corporation and The Burlington Northern and Santa Fe Railway Company (collectively, "BNSF" or the "Petitioners") on March 20, 2000.

INTRODUCTION AND SUMMARY

The Petition for Stay filed by BNSF should be denied because:

1. The petition for a stay does not seek to maintain the status quo, but instead requires the Board to receive, against its sound judgment, an application that will launch a lengthy process, engaging potentially hundreds of parties and dissipating resources and efforts by the Board and those hundreds of parties, lasting at least a year,[1] governed by a set of rules and regulations that the Board has found to be obsolete and in need of thorough rethinking and recasting. Unleashing such a wasteful exercise cannot be said to be a simple maintenance of the status quo, which is the usual office of a stay.

2. Granting the stay would in essence make the Board's Order a nullity. Judicial review of the Board's major orders rarely is accomplished within a 15-month period, the period

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[1] The BNSF and Canadian National Railroad Company ("CN") have proposed a 365-day schedule to the Board. BN/CR-8, F.D. 33842, filed Feb. 3, 2000.

contemplated by the Board's Order for a halt in the processing of major rail mergers by the Board. If a stay were granted, the Petitioners and CN would have little incentive to expedite their petitions for review before the Court of Appeals. We call to the Board's attention that the oral argument before the Court of Appeals in the UP/SP merger, which was authorized on August 12, 1996, did not take place until September 11, 1998, and the court's decision was not rendered until March 23, 1999; and that the CSX/NS-Conrail Transaction which was authorized on July 23, 1998, has not yet been argued before the reviewing court. Thus, the grant of a stay is apt to amount to a complete negation of the Board's Decision in that the Board will be required to conduct a merger proceeding while simultaneously conducting a separate rulemaking proceeding to establish the rules of relevancy and adjudication in that proceeding.

3. The usual tests of agencies and courts for the granting of preliminary relief by way of a stay are not met in this case. Those tests involve a balancing of the equities among the parties as to the irreparable harm caused by granting or denying a stay, consideration of the public interest, and a forecast of the likelihood of success on the merits. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1984). Here, irreparable harm to the railroad industry generally from the very pendency of a CN/BNSF Application is detailed in the Board's Decision at 2-3 and 7-9. The wasteful process of launching an application for a major combination, sought by Petitioners, under obsolete rules, and with at best revisions to the rules cobbled together without necessary study, is clearly an irreparable harm to the public. Although consideration of the CN/BNSF merger is deferred for 15 months, they may then submit their Application, if they wish, under the new rules when they are promulgated. In the meantime, since they have presented their transaction as "end-to-end," they can engage in service coordinations short of merger that will provide them and the shipping public with most of the same benefits that the transaction

is alleged to provide, without any of the harms potentially inherent in a merger.[2] Moreover, the Board has declared that the public interest is opposed to major railroad combinations in the next 15 months while the new rules are being formulated, and that Decision is soundly based.

4. As to the likelihood of the Petitioners' success on the merits, the Board's authority to impose the hold on further rail consolidations is clear in the power of the Board to control its own processes and to establish standards though rulemaking rather than in case-by-case adjudication. This is a clear authority that supports the Board's Order entirely apart from the statutory authorities set forth in the Board's Order.

We will briefly expand below on each of the foregoing points.

DISCUSSION

1. Granting the Stay Would Upset the Status Quo, Rather Than Preserve It. — The usual stay of a an agency's order preserves the status quo — such as by preventing one entity from taking control over another — until judicial review proceedings are completed. Even stays of that sort by the Board, or by a court with respect to an order of the Board, are rare, though they maintain the status quo. The stay sought here would not preserve the status quo; rather, it permits the Petitioners to file an application to the Board that will launch a proceeding at least as large as the Conrail case, which, as the Board knows, involved an application of close to 15,000 pages, participation by over 160 parties on an active basis, dozens of depositions, 88 decisions by the Board or an ALJ before the final decision, more than a thousand filings by various parties with the Board, and an enormous environmental analysis project.

That application would be launched, after a "stay" was granted, under a set of regulations designed 20 years ago when there was excess capacity in the rail system and dozens of Class I railroads existed. The Board in its Decision has characterized those regulations, and some of the

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[2] Indeed, § 5.13 of their Combination Agreement requires CN and BNSF to "develop and implement a range of mutually beneficial interline coordinations," to the extent the law permits, as soon as practicable and prior to any Board approval. We do not understand the Board's Order as blocking this.

substantive adjudicatory principles established under them, as in need of a thorough reexamination and rewriting. Order at 5. The Board has quite properly identified the chaos that would be caused in trying to rewrite the rules and at the same time to consider an application under a melange of the old rules and whatever new principles the Board was able to develop as of that time. Order at 6-7. While these two discordant tasks were being performed simultaneously — considering the CN/BNSF application while engaging in replacement rulemaking — the statutory deadlines set forth in 49 U.S.C. § 11325 would be running. Such a proceeding is likely to be wasteful and violative of the procedural and substantive rights of those opposing or making comments on the Application, let alone the rights of CN and BNSF, which they have not waived. Clearly the only fair way to conduct a transcontinental rail merger proceeding is to establish the rules beforehand so that the Application may submit proofs accordingly and opponents will know what is required of them.

The grant of such a "stay" should require a heavy burden of proof of irreparable harm and likelihood of success, and there is no showing made by the Petitioners that would support it.

2. Granting the "Stay" Would Make the Board's Order a Nullity and, in Effect, Amount to the Board's Setting Aside Its Own Decision. — Little argument is needed for this proposition. If a "stay" were granted, CN and BNSF would have little interest in pursuing their Petitions for Review in court. In the ordinary course, judicial review of merger decisions of the Board, simply at the Court of Appeals level, takes more than 15 or 16 months.[3] Thus, not only would the period in which the Board's regulations were to be rewritten be over by the time of the decision, the Board might be required to render a decision before the judicial review proceedings were completed, thus creating an absurd situation with the possibility of the Board having to render a decision under a set of rules which it was simultaneously replacing as obsolete. Adding to the absurdity, if the Board's Decision were held to be unsupported, that would not affect the

[3] Sixteen months is approximately the sum of the times allowed for the various phases of processing a Class I merger application provided for in § 11325.

validity of the new rules, and so the result of the granting of the stay would be to permit the Petitioners to act as "gun jumpers" and to obtain the benefits of the "lower bar" as the CEO of CN, M. Tellier, apparently views the present rules.[4] Given the Board's clearly correct determination to launch a rulemaking process, the only way to hold CN and BNSF to what M. Tellier has promised is to maintain the halt on the filing or prosecution of applications until that rulemaking is complete.[5]

3. The Balance of the Equities and the Public Interest Militate Against a Stay. — The balance of irreparable harm to be involved in the grant or denial of the stay clearly supports denial. In the first place, on the level of the Board's processes the "forensic world," the potential for waste and absurd outcomes, discussed in Parts 1 and 2 above and in the Decision at 3 and 7-9, is clear.[6] On the level of the "real world" rather than the "forensic world," the Board has cogently found that the continuation of the CN/BNSF merger proposal at this time would cause public harm. Decision at 2, 4-5, and 8-9. The only harm to the Petitioners is the postponement of the time in which they can file their application.[7] They will be free to do so, if they wish, under the new rules after the rulemaking is done. Thus, they will know what the standards are when they file their application. Petitioners have presented their transaction as an "end-to-end" merger, not involving the rationalization of duplicative routes or facilities. To the extent that is true, many of the benefits to the public that are asserted can be achieved initially through cooperative efforts between CN and BNSF, short of merger, such as pre-blocking, run-

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[4] See his statement when he insisted that CN and BNSF were willing to file and prosecute an application even if the "bar" is "raised," the same as anyone else. Tr. 03/07/00, at 137, quoted at length below

[5] The BNSF Petition now asserts that the CN/BNSF Application must be judged by the existing rules, contrary to M. Tellier's *defi*. BNSF Pet. at 6-7.

[6] The BNSF Petition is ambiguous about whether lost litigation labors constitute irreparable harm; its labors in preparing the Application to date are irreparable (BNSF Pet. at 6-7); everyone else's in opposing an application filed under obsolete rules are not. *Id.* at 9-10.

[7] The break-up date in the Combination Agreement, § 9.1(ii), is December 31, 2002, enough time for the 15-month halt and a 16-month proceeding.

through trains, harmonization of computer systems, publication of joint schedules, and the like. As noted above (note 2), the two of them have agreed to do so, merger or no merger.

Overarching the interests of the two sides is the public interest, which the Board is charged with ascertaining, declaring, and enforcing in rail combination cases. The Board has declared in its Decision that the progressing of major rail combinations, at least in the next 15 months while its rulemaking process will be going on, would not be in the public interest. Nothing has been shown in the Petitions that would change that determination.

4. The Board's Decision Is Amply Authorized, and Can Be Based Solely on Its Power to Protect Its Own Adjudicatory Processes, Let Alone the Other Authorities Cited in Its Decision. — An issue generally reviewed in connection with granting preliminary relief in cases such as this is the likelihood, or the lack of likelihood, of the success on the merits by the petitioning parties. Here the chances of that success are low.

There was common acceptance at the Board's hearings in this matter of the proposition that a set of regulations and principles that worked when there were dozens of Class I carriers might not work when the total major rail systems on the North American continent have been reduced to six. A number of major issues about mergers and the public interest in 2000 and beyond are left unanswered by the Board's existing regulations and by the Board's decisions and those of its predecessor; and in other cases, the old answers have become questionable. M. Tellier of CN recognized that standards are likely to be raised and welcomed that:

> Basically, you raise the bar and you, as the Surface Transportation Board, tell us what are the standards that you expect us to meet. And as we have said in our written statement, if you are going to apply these new standards for our transaction, fine with us, and we will ensure that we meet these standards. Tr. 03/07/00, at 137 ln. 10-16.

Clearly, if the "bar" was to be raised for CN/BNSF, it should be raised for the other major transactions coming after it, and there was no dissent from that. Indeed, M. Tellier, in his prepared statement, proposed new factors to be considered by the Board in all major mergers.

Statement at 22. It is clear that if the "bar" were raised, further evidence would be required in order to present a *prima facie* case of consistency with the public interest.

The only way to assure that goal of an equal "bar" in the phase of transcontinental mergers, a goal which all of the parties appeared to accept two weeks ago,[8] is, as the Board did, to institute a thorough rulemaking process in which the Rail Combination Procedures are to be rethought, including the Board's Statement of Policy, with its substantive content defining the "public interest." Clearly the Board has the power to do this, to adopt substantive rules that may have the effect of predetermining the outcome of adjudicatory proceedings and foreclosing a party's right to contest that issue in an individual proceeding. *See Heckler v. Campbell*, 461 U.S. 458 (1983); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *U.S. v. Storer Broadcasting*, 351 U.S. 192 (1956); *American Trucking Associations v. U.S.*, 642 F.2d 916 (5th Cir. 1981); *Chemical Leaman Tank Lines, Inc. v. U.S.*, 368 F. Supp. 925, 935 (D. Del. 1973). The Board has, of course, undoubted power to make and revise regulations (49 U.S.C. § 721(a)); and its enumerated powers are not exclusive. *Ibid.*

It would create a legally and procedurally chaotic situation to receive and process applications during the period in which such a rulemaking proceeding was pending. The applicants would assert a right to adjudication under the existing rules, possibly subject to their supplementation of their application with whatever additional evidence the Board might thereafter require. Supplementation would disrupt the procedural regularity of processing the application and, if the rights of due process of those opposing the application were to be respected, could well cause the statutory limits on processing time to be exceeded. There would be no guarantee that the "bar" as finally placed in the ensuing regulations would treat those entities subsequently filing applications in the same way as the applicants who had been permitted to file while the rules were being rethought and revised.

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[8] *But see* the BNSF backsliding, note 5, above.

Those propositions are obvious and clear. The Board embraced them. Decision at ___. Nonetheless, the Petitioners have taken the position that the Board is without power to enforce any sort of effective procedural solution to this problem, and insist that they have an unqualified right to file an application at any time and if that application meets the existing regulations of the Board, however much in need of revision, to have that application passed on within the statutory period set forth in 49 U.S.C. § 11325. The decisions of the courts reject that view and hold that an agency may, while conducting a rulemaking procedure that will affect the standards for applications, refuse to entertain applications until the conclusion of the rulemaking procedure. *Permian Basin Area Rate Cases, supra; Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759 (3d Cir. 1979); *Kessler v. FCC*, 326 F.2d 673, 683 (D.C. Cir.1963); *Harvey Radio Labs. v. U.S.*, 289 F.2d 458 (D.C. Cir. 1961); *Mesa Microwave, Inc. v. FCC*, 262 F.2d 723 (D.C. Cir. 1958).[9]

Petitioners claim a vested right to file an application once a Notice of Intent is filed. BNSF Pet. at 6. Neither the regulations nor the statute (which does not contemplate such notices at all) provide for such a right. The Board, rather than forthrightly forbidding the filing of applications, clearly could have announced that it will be unable to conclude, while its rule-making procedure is going on, whether an application will make a *prima facie* case of consistency with the public interest, since the content of the "public interest" remains yet to be defined. Thus, any application that is filed must, under the existing terms of 49 C.F.R. § 1180.4(c)(8),[10] be summarily denied as not presenting a *prima facie* case. CN has said that the only ground that the Board has for rejecting an application is incompleteness, referring to 49 C.F.R.

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[9] The *DeBruce* cases, cited by BNSF (Pet. at 3-4), do not assist them. The cases upheld the analysis we have presented herein for granting preliminary relief. The Board's Order of March 17, 2000 is not preliminary relief, but a final procedural order halting, for a defined period of time, the filing or processing of applications before the Board. The fact that the Order is not perpetual does not make it an order for preliminary relief. BNSF's "stay" application is an application for preliminary relief, although it has the effect of granting permanent relief.

[10] BNSF contends that the existing regulations would govern the adequacy of its Application. *See* BNSF Pet. at 6.

§ 1180.4(c)(7). CN Post-Hearing Comments at 26. But even a complete application, one that meets the "old" regulations, is to be rejected if it does not make a *prima facie* case, under § 1180.4(c)(8).

The Applicants have an affirmative obligation on the part of the Applicants to present such a *prima facie* case. In a period where the standards are in flux, and the Board has declared that it is reconsidering the standards, a conclusion that applications would not present a *prima facie* case under the standards yet to be defined is not only obvious, but required.

Once that proposition is recognized, the rest of the apparatus presented by the Petitioners falls under its own weight. There would be no case of "unreasonable withholding of agency action" under the APA, either under the relatively broad approach to statutory processing deadlines in *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999), or in the more complex cases more liberally allowing exceptions and exemptions from statutory periods found in the D.C. Circuit, where the Petitions for Review have been filed.[11] In effect, the application would be summarily adjudicated, as on a Rule 12(b)(6) motion in court, as not presenting a *prima facie* case, and would be denied, within 30 days of its filing. The result might not be pleasing to BNSF, but there would be no unreasonable delay. None of the statutory periods would be violated; the outcome would be swifter than BNSF might like, but certainly not in violation of the statutory time periods. Those periods do not compel the grant of applications; they are consistent with the denial of applications, unless the applications on their face meet the public interest test. The Board's regulations for 20 years have imposed the burden of showing a *prima facie* case of consistency with the public interest upon applicants, under pain of rapid summary dismissal. Failure to demonstrate that consistency may arise from reasons not within the control of the applicants, such as a serious reevaluation of the content of the public interest at

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[11] *In re Barr Laboratories, Inc.*, 930 F.2d 72 (D.C. Cir.), *cert. denied*, 502 U.S. 906 (1991); *In re United Mine Workers*, 190 F.3d 545 (D.C. Cir. 1999); *Telecommunications Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984).

appropriate times. The statutory periods protect against the uncertainties of prolonged processing times, not against speedy rejections.

All that the Board has done, in the light of its unquestionable power and duty to reject or summarily deny applications that do not present a *prima facie* case, is to dispense with the burden and formality of receiving an application and rejecting or summarily denying it within the 30-day time period of § 11325(a) as incapable of being measured against the standard that is being redefined. We note that the statute appears to contemplate the possibility that the clock of the procedural time schedules may never start; the statute says only that the "Board may begin a proceeding to approve and authorize a transaction." § 11324(a) (emphasis supplied).[12]

The Board thus has ample power[13] to prevent the absurdity of having to process applications while it is fundamentally rethinking its substantive and procedural regulations governing those applications.

CONCLUSION

For the reasons stated, the Petitions for Stay should be denied.

Respectfully submitted,

[12] Indeed, the timeframes in § 11325 leave open an important matter; they define when the Board's decision must be served but leave unconstrained the Board's powers to postpone the effective date and to change its decisions "at any time on its own initiative." 49 U.S.C. § 722(a), (c).

[13] For the broad rulemaking authority of the Board, including the authority to fashion remedies not expressly authorized by statute: *ICC v. American Trucking Associations*, 467 U.S. 354 (1984); *Trans Alaska Pipeline Cases*, 436 U.S. 631 (1978); *U.S. v. C&O Railway Co.*, 426 U.S. 500 (1976); *American Trucking Associations v. U.S.*, 344 U.S. 298 (1953). The powers here flow clearly from the statute and existing regulations. *Cf. also* 49 U.S.C. § 721(b)(4), an authority also present but, we suggest, not even needed.

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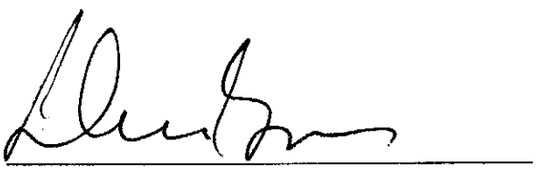
March 23, 2000

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on this 23rd day of March, 2000, I have caused the foregoing "REPLY OF CSX CORPORATION AND CSX TRANSPORTATION, INC. TO PETITION FOR STAY BY BURLINGTON NORTHERN SANTA FE CORPORATION AND THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY" to be served by first-class mail, or by a more expeditious form of delivery, upon the persons identified in the attached service list.



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